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CITATIONS

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Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOSEPH T. STRONG, d/b/a STRONG ROOFING & INSULATING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, insofar as it denies enforcement of the portion of the Board's order requiring the payment of certain fringe benefits.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–21) is reported at 386 F. 2d 929. The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 27–42) are reported at 152 NLRB 9.

JURISDICTION

The decision of the court of appeals was entered on July 14, 1967 (App. A, *infra*, p. 13). The Board's

timely petition for rehearing *en banc* was denied on January 18, 1968 (App. B, *infra*, p. 22),[1] and a decree was entered on February 19, 1968 (App. B, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that an employer committed an unfair labor practice by refusing to execute a collective bargaining agreement negotiated on his behalf by a multi-employer group, may require the employer retroactively to pay certain benefits that he would have paid had he signed the contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix D (*infra*, pp. 41–47).

STATEMENT

A. THE BOARD'S DECISION

Respondent Joseph T. Strong is engaged in the roofing of residential and commercial buildings (App.

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[1] While the Board's petition for rehearing was pending, the employer/petitioned for a writ of certiorari to review the portions of the court of appeals' decision which were adverse to it (No. 901, this Term). The Board opposed the employer's petition, and suggested that, since the issue presented by the employer was independent of that raised by the Board, this Court need not await a ruling on the Board's petition for rehearing (Brief in Opp., p. 10, n.9). The employer's petition for certiorari was denied on January 29, 1968.

C, *infra*, p. 2[illegible]; R. 12).[3] As a regular member of the Roofing Contractors Association of Southern California, Strong was bound by any collective bargaining agreements between the Association and the Union, which represented a multi-employer bargaining unit comprised of the employees of the Association's regular members (App. C, *infra*, p. 2[illegible]; R. 13–14; Tr. 13, 37, 59, 85).[4] On August 14, 1963, the Association and the Union agreed upon the terms of a new four-year agreement, to be effective from August 15, 1963, to August 15, 1967 (App. C, *infra*, pp. 2[illegible]–30; R. 15; Tr. 16, 35). One of the terms of this agreement required each employer to make certain payments to various union trust funds (a health and welfare fund, a fund for vacation benefits, and an apprenticeship and training fund); part of these fringe-benefit payments were deducted from the employees' wages, and the remainder represented sums contributed by the employer, based

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[2] "R." references are to Vol. I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Vol. II; "G.C. Exh.", "R. Exh.", and "T.X. Exh." references are to the exhibits of the General Counsel, respondent, and Trial Examiner, respectively.

[3] Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association.

[4] The Association's By-laws provide (G.C. Exh. 2, p. 9):

"Each and every regular member shall recognize the Association, its counsel, and each of its duly selected labor committees as the member's exclusive bargaining representatives for negotiating, reaching, agreeing to abide by, and/or signing any and all collective bargaining agreements with labor unions. * * * Any such labor contract negotiated by the Committee shall be binding upon the regular members of this Association separately and collectively."

on the hours worked by his employees (G.C. Exh. 4, Art. XI, pp. 14–20).

On August 20, 1963, Strong wrote to a grievance board composed of contractor and union representatives, requesting termination of the contract and the refund of his security deposit (App. C, *infra*, pp. 32–33; R. 15; Tr. 22, 66, 67, R. Exh. 3).[5] In September 1963, Strong asked the Association to change his status from that of a regular member to that of an associate contractor,[6] although he continued to pay regular members' dues until December of that year (App. C, *infra*, p. 34; R. 16; Tr. 14–15, 20, G.C. Exh. 3). He also paid fringe benefits to the Union Roofers Trust Fund in September and October of 1963 (App. C, *infra*, pp. 32–33; R. 15; Tr. 69, 78, 88, G.C. Exh. 5 (a) and (b)).

On October 18, 1963, a Union representative asked Strong's wife, who managed his office, to have Strong sign the new Association contract (App. C, *infra*, p. 35; R. 16; Tr. 90–91). Mrs. Strong stated that her husband had withdrawn from the Association and would not sign (*ibid.*). In December 1963, and in April 1964, Strong and his wife again rejected Union requests that he sign the contract (App. C, *infra*, p. 36; R. 16; Tr. 37, 51–52, 72–73, 84–85, 92).

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[5] The Master Agreement required that regular members deposit $400 with the Association to insure payment of wages and fringe benefits due under the contract (App. C, *infra*, p. 34; R. 15; Tr. 14–15, 22–23, T.X. Exh. 1, G.C. Exh. 4).

[6] Under the By-laws of the Association, associate contractors are members who operate non-union shops and are not covered by the Association's collective bargaining agreement (R. 14; Tr. 24–25, G.C. Exh. 2).

On June 3, 1964, the Union filed unfair labor practice charges with the Board, alleging that Strong's refusal to sign the new Association contract constituted a refusal to bargain, in violation of Sections 8(a) (5) and (1) of the Act. A complaint was issued on these charges. (App. C, *infra*, p. 2[illegible].)

The Board found that Strong's attempt to withdraw from the multi-employer bargaining unit was untimely, and that accordingly Strong's refusal, in and after April 1964, to sign and honor the 1963 Association agreement constituted a refusal to bargain with the Union, in violation of Sections 8(a) (5) and (1) of the Act (App. C, *infra*, pp. 2[illegible]–2[illegible], 3[illegible]–3[illegible], 3[illegible]; R. 17–19). The Board ordered Strong to cease and desist from the unfair labor practices found, to execute and honor the agreement, to pay to the appropriate source any fringe benefits provided for in the contract, and to post appropriate notices (App. C, *infra*, pp. 3[illegible]–3[illegible]; R. 17–19).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals affirmed the Board's unfair labor practice finding and enforced its order, except for the requirement that Strong pay fringe benefits provided for in the contract (App. A, *infra*, pp. 13–21). As to that provision, the court concluded (App. A, *infra*, p. 21):

> In general, the Board has no power to adjudicate contractual disputes. * * * Here the unfair labor practice was the refusal to bargain by refusing to execute the contract. The order of the Board requiring the payment of fringe benefits to the appropriate source is an order to respondent to carry out provisions of the

contract and is beyond the power of the Board. * * *

REASONS FOR GRANTING THE WRIT

1. The holding of the court below—that the Board may not, as a remedy for an employer's refusal to execute a collective bargaining agreement, in violation of Sections 8(a) (5) and (1) of the Act, order the employer to pay retroactively the fringe benefits which he would have paid under the contract had he signed it—conflicts with the decisions of several other courts of appeals which have enforced similar requirements. In *National Labor Relations Board* v. *George E. Light Boat Storage Co.*, 373 F. 2d 762, 767–768 (C.A. 5), the court enforced a Board order requiring the employer to make back overtime and back welfare-fund payments, pursuant to an existing contract, for the period during which the employer had repudiated the contract and refused to bargain with the union. In rejecting the same arguments which the court below accepted in the present case, the Fifth Circuit held that the Board was authorized to impose such a requirement because it was reasonably designed to remedy the employer's violation of Section 8(a) (5). The court said (373 F. 2d at 768):

> A simple order to bargain in good faith would not be sufficient. To allow an employer unlawfully to repudiate a collective bargaining agreement at the small cost of being required, sometime in the future, to sit down and bargain with the union would encourage such violations of the Act. * * * The temptation to violate the Act in a situation where the employer would have

everything to gain and nothing to lose could be overwhelming.

Similarly, in *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 362 F. 2d 217 (C.A. 4), the court enforced a Board order requiring an employer to compensate the employees for any benefits which were due them under a contract, but which had been withheld by reason of the employer's unlawful refusal to sign the contract after he had reached agreement with the union on all of its terms. And the Second Circuit, in *National Labor Relations Board* v. *Sheridan Creations, Inc.*, 384 F. 2d 696, held an employer in civil contempt for refusing to make retroactive contributions to certain union trust funds pursuant to that court's earlier decree (357 F. 2d 245), enforcing a Board order based on a finding, similar to the finding involved in the present case, that the employer had violated Section 8(a)(5) by refusing to ratify a collective bargaining agreement negotiated in his behalf by a multi-employer association from which he had made an untimely attempt to withdraw. Although neither *Huttig* nor *Sheridan Creations* discussed the validity of the Board's provision for retroactive payments, those decisions necessarily recognized the Board's authority to grant such relief.[7]

[7] In several other cases the courts have enforced Board orders containing back payment requirements similar to the requirement in issue in this case. See *e.g.*, *National Labor Relations Board* v. *Ogle Protection Service, Inc.*, 375 F. 2d 497, 500-501 (C.A. 6), enforcing 149 NLRB 545, 548, certiorari denied, 389 U.S. 843; *National Labor Relations Board* v. *M & M Oldsmobile, Inc.*, 377 F. 2d 712 (C.A. 2), enforcing 156 NLRB 903, 917; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964 (C.A. 8), enforcing 154 NLRB 811, 812.

It is immaterial that *Light Boat* and *Huttig* involved an employer's refusal to perform or execute a contract negotiated directly between him and the union, whereas the contract in the present case (like that in *Sheridan Creations*) involved a contract negotiated in his behalf by a multi-employer group of which he was a member. In either situation, the governing legal principle is the same: The Board, in order effectively to cure the employer's unfair labor practice of refusing to execute the contract, may require him to perform the acts he would have done under the contract if he had not repudiated it, and thus restore the benefits that have been unlawfully withheld from the employees by reason of the unfair labor practice. The rationale of the court of appeals in this case—that the Board's order was improper because it constituted an attempt to enforce contract rights, a function that Congress has given to the courts and not to the Board[8]—would have been equally applicable in *Light Boat* and *Huttig* and would have led to invalidation of the Board's orders in those cases. The decision of the court of appeals in the present case, both in its result and its reasoning, is at odds with the foregoing decisions of three other circuits.

2. The decision below is also contrary to the principles which this Court has enunciated respecting the scope of the Board's remedial authority under Section 10(c) of the Act, which empowers the Board to order a person who has engaged in an unfair labor

[8] See Section 301 of the Labor-Management Relations Act, 61 Stat. 156 (App. D, *infra*, p. 4).

practice "to take such affirmative action * * * as will effectuate the policies of this Act." Under this provision, the Board has power to enter an order which will restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. See also *Fibreboard Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216. The Board's requirement that respondent pay the back fringe benefits in this case is entirely consistent with that standard.

The full remedy for respondent's unfair labor practice in the present case was to deprive him of the advantages of his unlawful conduct by requiring him to pay the clearly ascertainable fringe benefits which had accrued during that period. The purpose of such a requirement is not to enforce private contract rights but to protect the union's status as bargaining representative and to effectuate the policies of the Act. See *National Labor Relations Board* v. *C & C Plywood Corp.,* 385 U.S. 421, 429 n.15; *George E. Light Boat, supra,* 373 F. 2d at 768–769; *National Labor Relations Board* v. *United Nuclear Corp.,* 381 F. 2d 972, 979 (C.A. 10). The theory of the court below, that the Board improperly was enforcing contract rights,[9]

[9] The cases relied on by the court below (App. A, *infra*, p. 21) do not support its position. As we have shown, *George E. Light Boat, supra,* holds precisely to the contrary. And the Board's decision in *National Labor Relations Board* v. *Hyde,* 339 F. 2d 568, 572 (C.A. 9), enforcing 145 NLRB 1252, in which it rejected the Examiner's recommendation that the employer be ordered not only to "honor" but also to "comply" with the terms of the contract, is not inconsistent with its remedy in this case; the breadth of the Examiner's proposed order

reflects the same misconception of the agency's authority that the court evinced in *National Labor Relations Board* v. *C & C Plywood Corp.*, 351 F. 2d 224 (C.A. 9), reversed, 385 U.S. 421, in which this Court held that the Board may interpret collective bargaining agreements when necessary to determine and effectuate the rights guaranteed in the Act. Similarly, the Board is not precluded from providing an appropriate remedy merely because such relief is measured by contractual rights.

3. The issue is important in the administration of the Act. The requirement which the court below refused to enforce is one which the Board customarily prescribes for the type of unfair labor practices found here.[10] Unless it is corrected by this Court, the decision below will cast uncertainty over the Board's authority to impose effective remedies for an employer's failure to comply with his statutory duty to bargain.

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in *Hyde* would have required the Board to oversee the entire contract and determine whether the employer's subsequent performance satisfied all of its terms. See *George E. Light Boat*, *supra*, 373 F. 2d at 768, 769.

[10] In addition to the cases cited *supra*, pp. 6–7, see *e.g.*, *B–Y Manufacturing, Inc.*, 166 NLRB No. 95, p. 3; *Tanner Motor Livery, Ltd.*, 160 NLRB 1669, 1688; *Quiel Bros. Electric Sign Service*, 153 NLRB 326, 331; *Mayes Bros., Inc.*, 153 NLRB 18, 24; *Big Run Coal & Clay Co.*, 152 NLRB 1144, 1148; *Selma Trailer & Mfg. Co.*, 151 NLRB 1342, 1351; *Cooke & Jones, Inc.*, 146 NLRB 1664, 1679, 1681.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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